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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Appeal From The Supreme Court of the State of Illinois.

REPLY BRIEF FOR CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL., PLAINTIFFS-APPELLANTS.

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ARGUMENT.

I.

Appellants have standing to challenge the 1951 Act under Section 8 of Article I and other provisions of the Constitution of the United States.

Appellees contend that appellants have no standing in this Court to challenge the 1951 Act under Section 8 of Article I of the Constitution of the United States in Point I of their argument (appellees' brief, p. 11-14).

This court has already noted probable jurisdiction of the cause in an order entered on October 13, 1952 (R. 336) over the same objections to jurisdiction urged by appellees in their brief under Point I.

Jurisdiction was and is invoked under sub-section 2 of Section 1257 of Title 28 of the U. S. Code.

Appellees in effect admit that this court has jurisdiction when they confine their objections to the Commerce Clause. Appellees do not question that this court has jurisdiction to decide whether the 1951 Act is repugnant to the Equal Protection and Due Process Clauses of the Constitution.

The appellants' vital connection with interstate commerce is clearly evident from the record.

Some appellants cross state lines themselves. For example, Co-ordinated Transport transports freight in interstate commerce in Wisconsin, Illinois, Indiana, and Ohio (R. 37-39); Wagner Transfer does seventy-five per cent (75%) of its work between States (R. 53); Alton Box Board operated one million miles outside of Illinois in 1951 (R. 61); appellant Young's leased trucks in that same year operated only 200,000 miles within Illinois and 2,300,000 miles outside the State (R. 66-7).

Other appellants participate in interstate commerce no less directly. Even carriers such as appellant Kain and appellant Ryan are integral parts of interstate commerce; Kain travelled but 2000 of a total of 55,000 miles outside of Illinois (R. 70), but leased his equipment to an interstate carrier with offices outside Illinois in Iowa (R. 69). Ryan is a connecting carrier connecting with interstate operators and sharing in a rate set by the Interstate Commerce Commission, although Ryan's entire mileage was in Illinois (R. 76).

Appellant Haen operates in an interstate exchange of trailers (R. 71); Gold Star Motor Service (Church) is a connecting carrier in interstate commerce (R. 86), and appellant Valentine not only is a terminating carrier in interstate commerce, but does cross country hauling in all 48 states through a lease arrangement with Allied Van Lines (R. 96).

Koehler operates 1,000 miles yearly outside Illinois carrying farm products (R. 78). Elgin Transfer and Storage, although actually operating only 2,500 miles outside Illinois, does 70% of its total mileage of about 824,000 miles in interstate commerce by acting as a terminating and originating short haul carrier connecting with interstate line haul carriers (R. 83, 84). Dumont Cartage operated 8,000 of 571,000 miles outside of Illinois but does 75% of its business in interstate commerce in the same manner as Elgin Transfer and Storage (R. 89, 90). Of all the appellants Field alone operates exclusively in intrastate commerce (R. 81).

These facts in evidence in support of the averments in the complaint that appellants were engaged in interstate commerce clearly bring appellants within that class of persons as to whom the act is unconstitutional as a violation of Art. 1, Sec. 8 of the Constitution of the United States. All types of carriers, engaging in diverse operations with varied equipment and capital engaged in interstate commerce, are before the Court.

Because plaintiffs are engaged in interstate commerce they are directly and personally injured by the burden on that commerce imposed by the 1951 Act.

The cases cited by appellees (appellees' brief, P. 13), are not in point with the case at bar. Here appellants' connection with interstate commerce and the resulting

burden of the 1951 Act on interstate commerce were both pleaded and proved. In *Southern Ry. Co.* v. *King,* 217 U.S. 524, 534, the burden of the Georgia statute on interstate commerce, this court held, was not even properly pleaded let alone proved. In *M. K. & T. Ry. Co.* v. *Cade,* 233 U.S. 642, 648, the judgment appealed from was clearly not based on a claim arising out of interstate commerce. *Massachusetts* v. *Mellon,* 262 U.S. 447, 488, involved the validity of the Maternity Act and the Commerce Clause was not mentioned in the opinion. *Hendrick* v. *Maryland,* 235 U.S. 610, 621, was decided upon its merits and *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, 595-6, involved federal jurisdiction based upon the jurisdictional amount of $3,000.00 and not upon interstate commerce.

Appellees' position is that appellants, despite their obvious participation in and intimate connection with interstate commerce, have no right to complain of the burden on interstate commerce because all the appellants are either residents of Illinois, Illinois corporations or foreign corporations licensed to do business in Illinois with places of business in this state and thus are taxed on a parity with other Illinois operators. This contention hardly merits answer in view of the facts of the case and the numerous decisions of this Court holding that it is the interstate commerce which is protected. See: *Puget Sound Stevedoring Co.* v. *Tax Commission of State of Washington,* 302 U.S. 90.

The place of residence or business of the person conducting such commerce is not controlling. In this connection the appellees' contention that *Miles* v. *Department of Treasury,* 209 Ind. 172; 199 N.E. 372 (appeal dismissed, 298 U.S. 604) is directly in point, may be easily

answered by *Freeman* v. *Hewitt*, 329 U.S. 249, reh. den. 329 U.S. 832. In the *Miles* case the burden of the Indiana Gross Income Tax Act of 1933 on interstate commerce was not discussed by the Supreme Court of Indiana when the appellants, as tax-payers, sought to enjoin payment of state funds for the printing of blanks. Later however, in the *Freeman* case involving the same tax involved in the *Miles* case this court accepted an appeal under then Sec. 237(a) of the Judicial Code, 28 U.S.C.A. 344(a) which is now 28 U.S.C.A. Sec. 1257, *exactly the same statutory provision under which jurisdiction is invoked in this case.* In the *Freeman* case the tax-payer was domiciled in Indiana. The securities had their situs in Indiana. The sale upon which the Indiana tax was imposed was in interstate commerce. In holding that the tax was unconstitutional and in disposing of the contention that because Indiana transactions were likewise taxed at the same rate as interstate transactions the tax was in all respects proper, this Court stated at page 273:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while

> the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things."

The Freeman case is a complete answer to the appellees' contention that because the appellants are engaged in intrastate operations they are therefore in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

Appellees also contend that there is no proof that additional taxes were paid to any other state for the privilege of using highways in interstate commerce by virtue of the reciprocity provisions in the 1951 Act. Aside from the fact that appellant Kain testified that he was obliged to pay additional fees in Iowa (R. 70) in addition to his Illinois taxes, this court in the Freeman case in disposing of a similar contention stated (P. 256-257):

> "But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. . . . Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because

of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."

We submit that the record establishes and the principles of law above cited confirm that appellants are entitled to challenge the 1951 Act.

II.

The 1951 Amendment imposes an undue burden on Interstate Commerce in violation of Section 8, Article I and Section 1, Amendment XIV of the Constitution of the United States.

A.

The tax bears no reasonable relation to the privilege of using the highways of the State of Illinois.

In their brief, appellees criticized our treatment of the Brice case contending that we have taken an inconsistent position. We believe that it will be apparent to the court that what we have done is to consider the matter in the alternative. It is our position that the Brice case does not stand for the proposition that whether or not a tax is constitutional must be judged solely by its result and not its formula. It is our position that the formula must be examined to see if the fees imposed relate to the privilege granted. If the formula bears no reasonable relationship to the privilege then the tax in invalid. However, we also take the alternative position that if the result bears no relationship to the value of the privilege regardless of the formula used, then of course, the tax is invalid.

The court should keep in mind that the study made by the Illinois Department of Public Works and Buildings and referred to on P. 16 of appellees' brief was based

upon the Griffenhagen report, which as we pointed out to the court in appellants' brief, was a report made by Griffenhagen and Associates, a group of engineers which had been hired by the Illinois Division of Highways for the very purpose of studying the highway system in Illinois and recommending a schedule of motor vehicle taxes. Mr. Barker, the Chief Highway Engineer, thought that the report was sound. He approved the report. He aided in the preparation of the report. Yet the legislature completely disregarded the tax schedule recommended by Griffenhagen and enacted a schedule which was approximately double that recommended by Griffenhagen.

Throughout their brief the appellees used the word "equalized" as though it were a magic touch-stone. The court should keep in mind that the only equalization that was done in this tax schedule was to increase all of the truck taxes with one exception while the tax on passenger cars was left untouched. This was done despite the fact as revealed in the evidence of the Chief Highway Engineer that many highway improvements are necessary because of the millions of passenger car automobiles, and the high speed at which they travel, and many other factors having no relationship to the heavy vehicles. The truck taxes were increased as high as possible to raise the most money possible without increasing the passenger car taxes. The basic assumption of the schedule was that the existing passenger car tax was correct, although there was no evidence to support this assumption. It is clear that the sole idea was to raise truck fees and not to distribute the cost of the improvements in accordance with the benefits received. As it appears from the schedule on page 18 of the appellees' brief, those trucks weighing 3,000 pounds and less should have been charged a tax of $1.62 per year, and yet they were taxed $5.00 as they had

been prior to 1951. If it had been the intention of the legislature to charge in accordance with the benefits received, even under their own theory, the tax for this group of trucks should have been reduced accordingly.

The appellees state on page 17 of their brief that the proceeds of the motor vehicle license taxes and motor fuel taxes are used exclusively for highway purposes. This is not strictly accurate, as the legislature has authorized the use of the fund for the construction of flight strips as well as for highway purposes. (Ill. 1951 Rev. Stats. Chap. 95½ Sect. 50).

The statements appearing on page 19 of the appellees' brief point out the necessity for a sound formula which relates the tax to the benefit received. The State Highway Department presented an estimate of need for the period of 1951—1960 of over one billion dollars. It could just as easily have made it ten billion dollars and there is no one who could say that the State Highway Department did not have plans which called for the expenditure of this amount of money, or that the expenditure of this amount of money was not necessary or desirable, and if the only test to be applied is whether or not the tax would exceed the amount of money claimed to be needed for highway purposes, then no such tax could ever be held invalid.

Professor Worley's testimony is attacked. At the outset, it should be kept in mind that we are not contending that Professor Worley's schedule of fees should be adopted nor are we contending that his is the only possible schedule. We stated this in our brief, but we feel it is necessary to state it again because the appellees have either failed to understand or have chosen to ignore our statements in this regard. Worley's testimony was offered

to demonstrate how the state's formula was misapplied, and as a competent yardstick for the court to use in determining whether the result was proper and bore relation to the value of the privilege granted. Worley's allocation of construction and maintenance costs on a percentage basis between factors due to weight and factors not due to weight was not arbitrary. A reference to page 32 of our brief shows that the Division of Highways of the State of Illinois spent in 1949 approximately 66% of the money spent for maintenance on items that were not related in any way to the weight of the vehicle passing over the highway, and this is the same percentage figure that was used by Professor Worley in allocating maintenance costs between items due to weight and those not due to weight.

Appellees do not give an accurate summary of Worley's testimony. Appellees state that Worley testified that whether the allocation of construction costs as between items due to weight and items not due to weight is the generally accepted view among highway engineers, was not known to him. Appellees would have the court believe that this theory of allocation is solely Worley's theory. This is not a correct resume of his testimony and if the court would read his testimony it will be seen that what Professor Worley said was that the amount of the allocation was often the subject of a difference of opinion, but it will be noted that he testified that *every highway engineer would recognize that certain costs incurred in the construction and maintenance of highways are in no way related to weight* and that it is always proper to make an allocation between those items which are not due to weight and the items which are due to weight. He said there would be no difference of opinion amongst qualified engineers as to the fact that the costs are distributed but there might be some difference of

opinion as to what the percentages should be. In support of this contention he cited Mr. Joseph Eastman, the United States Board of Investigation and Research, Bader and Downs, and the Griffenhagen report. Even the Chief Highway Engineer of the State of Illinois admitted that this theory of allocation was sound but stated that he made no effort to apply it because he thought it was impossible to determine the percentages of items due to weight and items not due to weight. He testified on page 193 of the record that the Griffenhagen report stated that traffic density may have more influence in some instances than weight; that passenger vehicles themselves may contribute to cost increments for such factors as speed, safety and convenience; highway construction and maintenance are influenced by such factors as weather, which have nothing to do with vehicle characteristics; costly highways have not been built solely to meet the requirements of heavy vehicles; and a large part of maintenance costs is independent of traffic. Despite his recognition of the soundness of the principle of allocation, Barker chose to ignore it altogether. He failed even to make a "rough approximation" which would have satisfied the legal requirements.

But it should be kept constantly in mind that we are not contending that Professor Worley's schedule should be adopted, and it should be kept in mind that his testimony was for the purpose of showing the fundamental fallacy in the tax schedule prepared by the state. We are not contending for scientific precision, but when the result shows that a schedule has been adopted which is as much as 300% excessive in certain classifications and which is approximately twice the amount of the tax recommended by the experts hired by the highway department to study the problem, it shows that the legislature has made no effort to correlate the tax to the benefits received.

Again, we are not objecting to a tax based on the ton-mile theory but we are objecting to the way in which the ton-mile theory was used in this case. When the evidence is clear that certain highway costs are not related to weight, and when the evidence is clear that the tax schedule is based solely on weight, then we earnestly contend that the formula has been misapplied and the resultant tax bears no relation to the value of the privilege of using the highway and is unconstitutional.

B.

The tax is excessive in amount.

Appellees make much of the fact that over the last thirty-five years costs of construction and maintenance of highways have tremendously increased. They fail to call the court's attention to the fact that the registration of motor vehicles in the State of Illinois has tremendously increased also during the past thirty-five years. The revenue has increased along with the increase in cost. Whether or not the motor vehicles of the State paid their fair share in tax heretofore is not the question before the court today, but the question to be determined is whether or not the present tax is excessive. Appellees state that we should not retain fees that are applicable to the "horse and buggy" days. It is extremely interesting to examine the taxes contained in the statutes of the State of Illinois which were in force in 1919 when the motor vehicle law was first passed, and the taxes contained in the present act with reference to passenger automobiles. That comparison follows:

Vehicle	1919 Fee	1952 Fee
Motor Vehicle—24 H.P. and less	$ 8.00	$ 6.50
Motor Vehicle—25-35 H.P.	12.00	10.50
Motor Vehicle—35-50 H.P.	20.00	17.00
Motor Vehicle—over 50 H.P.	25.00	22.00

The taxes for passenger cars are lower than they were in 1919.

When it is realized that even the state admits that many highway costs are necessary because of the great number and the high speed of the passenger car, it becomes readily apparent why the owners of trucks have justifiable cause for complaint.

Appellees state that the taxes previously approved by this court were involved in cases decided as early as 1915. While this is correct it should be kept in mind that the *Brice* case was decided in 1950 and the appendix thereto lists all of the cases that had previously been decided by the court up until that time. This tax is twenty times the size of any tax based on weight that has her tofore been sustained by this court.

Appellees add to their brief an appendix wherein they point out that under certain circumstances and with relation to certain truckers, two other states charge fees comparable to the Illinois fees. They discuss the said comparison at page 32 of appellees' brief. Of course, the Oregon tax is based on mileage actually travelled and hence is completely unlike the Illinois tax. Moreover, neither of the cited statutes has been tested in this court. Although such taxes might be justified under the peculiar circumstances in the states involved, in the absence of court approval they certainly do not prove the Illinois Act is not excessive.

Whether any of the appellants intend to register vehicles in the class of fifty thousand to seventy-two thousand pounds is immaterial. If the class is provided for in the schedule, then its legality must be determined. A reference to page 62 of the record shows that the Alton Box Board Company is operating trucks weighing fifty-six

thousand pounds. The question is not whether the state could prohibit the operation of a truck of this weight on its highways but as to whether or not the state has imposed a tax which is in excess of the privilege granted by the state for the use of the highway.

On page 36 of their brief appellees contend that even if this court were to hold unconstitutional the 1951 Act as applied to interstate operations, never-the-less each of the appellants would be required to pay the full amount of the tax because of the extensive intrastate operations which each may conduct. As shown under Part I of this reply brief the interstate activities of the appellants are so interwoven with their intrastate activities that it would be impossible for this act to be enforced against them at all in the event that it would be declared unconstitutional by this court. Gerald Adams of t Elgin Transfer and Storage Company testified that his company picks up numerous loads of goods in Chicago and transports them to Elgin. Many of the goods are flowing in interstate commerce. Some of the goods are only delivered from Chicago to Elgin, Illinois. How could anyone determine what part of the operation was intrastate and what part was interstate? However, regardless of how it might affect the operations of appellants, the only issue before this court is whether or not the Act violates the provisions of the Federal Constitution. We contend that it does, and that the Act should be declared unconstitutional.

III.

The taxes imposed by the 1951 Act are confiscatory and violate the 14th Amendment to the Constitution of the United States.

In Point IV of the appellees' brief, pages 37 to 44, an attempt is made to answer point II of appellants' brief.

Actually, appellees choose to ignore the basic theory of our argument, namely: that the amount of a fee or tax for revenue puposes is within the discretion of the legislature subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. This proposition of law has been asserted and repeated by this Court and by the courts of the several states time and time again as demonstrated in our original brief.

The gist of appellees' argument seems to be that the record fails to demonstrate confiscation of any trucker or of the industry by the Act. For example, at page 37 of their brief appellees state:

> "Not one of these witnesses testified that the increased taxes provided by the 1951 Act would force his concern to go out of business."

Actually, of course, as we have demonstrated, such testimony could not have been introduced into this record since a witness would not be competent to so conclude. However, we again point out that each of the witnesses testified as to the tax which he had previously paid, as to the tax which he will be obliged to pay under the new Act, as to his net profits in 1950 and his estimated net profits for 1951, as to his capital invested in his business and as to his inability to pass on these increases in taxes to his customers. This testimony demonstrated clearly that each witness' net profits would either be wiped out entirely by the operation of the 1951 amendment to the Motor Vehicle Act, or would be cut so drastically that the witness would not be able to make a fair return on the capital invested in his business, and that these tax payments could not be passed on in the form of higher rates to the customers who were using the witness' services. Not one shred of evidence was introduced by the appellees to contradict this

testimony. The fact of confiscation is clearly demonstrated by the record in the case at bar. Appellees were unable to produce so much as one witness engaged in the trucking industry able to testify either that his profits were sufficient to absorb the increased tax or to indicate that the tax increase could be passed on to his customers in the form of higher rates. Again we observe that this testimony is clear, conclusive and uncontradicted.

Moreover, appellees complain that only fourteen of the appellants testified at the trial in this cause, and indicate that these were a few hand picked marginal operators. True, only fourteen of the appellants testified. At the outset of the case we indicated that we intended to introduce some thirty-five or forty truckers (R. 40). However, after some two days of such testimony Mr. Chadwell stated:

> "I want to state further, if the Court please, that it seems to me that to go on with witnesses of this type serves no useful purpose in this case . . .".

Whereupon, the Court responded:

> " . . . it does seem to me that we have had a lot of it—now I don't know how much you—" (R. 91).

The abstract of record was prepared by the appellees, and perhaps they have managed to raise the implication that this colloquy had to do with something other than the amount of this type of testimony. The fact is, however, that both Mr. Chadwell and the Trial Judge were at the time in question discussing solely the amount of testimony which seemed to be and was in fact repetitious and cumulative. The repetition and cumulation of such testimony is certainly the only way that confiscation of an industry or a substantial segment thereof can be proven by competent evidence. We continued to introduce more of such testimony until a cross-section of the trucking in-

dustry had been heard. True, the record does not include all truckers who do business in Illinois, but the record does include, as we have demonstrated, both intrastate and interstate truckers, local truckers, short haul and long haul carriers, truck brokers, contract carriers, private carriers, carriers who range in size from the owner of one power unit up to the operator of fifty-nine power units; carriers who carry all types of merchandise as common carriers, and others who specialize in various types of merchandise. They range from having been in the trucking business since 1911 up to an operator who commenced in the business in April of 1951. Again we submit that the appellants who testified in this record constitute a complete and comprehensive cross-section of the trucking industry in the State of Illinois, and the fact is that confiscation was demonstrated to the satisfaction of the Trial Court.

As we pointed out in appellants' brief, page 55, in the case of *State* v. *Lucas*, 196 La. 299, 199 So. 126, the fact of confiscation was demonstrated by the testimony of one affected business man. Here fourteen testified and fifty-four joined in the litigation as parties plaintiff, and still others joined in the case of *Bode* v. *Barrett*, which is now before this Court as Docket No. 187. Despite all of this testimony, appellees have the effrontery or naivety to state at pages 38 and 39 of their brief:

> "We submit there is not a scintilla of evidence in the record in this case that any trucking concern will go out of business because of the taxes imposed by the 1951 Act. Neither is there any evidence that the effect of the tax will be prohibitory or confiscatory as to the trucking industry generally."

We submit that the fact of confiscation of the trucking industry, or of a large segment thereof, has been conclusively demonstrated, and there is not in the record a

scintilla of evidence to the contrary, and that, in view of the uncontradicted authority contained in appellants' brief that a legislature may not confiscate a legitimate and useful industry by excessive taxation, the 1951 amendment to the Illinois Motor Vehicle Act violates Section 1 of the 14th Amendment to the Constitution of the United States and is unconstitutional.

Appellees, at page 40 of their brief, indicate that we had expressed some doubt as to whether the 1951 Act is regulatory or a tax for revenue purposes. Actually, of course, we were never in doubt, but we did demonstrate in the alternative that whichever type of measure the 1951 Act is, it is invalid, and, moreover, that the basic theory adopted by the Illinois Court in some of its decisions relative to regulatory measures coincides almost exactly with the theories adopted by other Courts in holding excessive revenue measures unconstitutional.

The only other contention relative to the confiscation point made by the appellees is the amazing theory propounded "that where the legislature has the power to lay a tax as a revenue measure there is no constitutional limitation upon the amount of the tax that may be imposed." (appellees' brief p. 40). Ignoring the many cases which we cited in our original brief to the effect that the legislature is limited by the due process clause of the 14th amendment, appellees seek to establish their proposition by citing three cases, namely: *McCray* v. *U. S.*, 195 U.S. 27; *Magnano* v. *Hamilton*, 292 U.S. 40; *United States* v. *Sanchez*, 340 U.S. 42. The *McCray* case and the *Magnano* case both dealt with excise taxes on oleomargarine, and the *Sanchez* case dealt with the validity of the Marihuana Tax Act. The authorities which we cited in appellants' brief have conclusively indicated that where a legislature might prohibit a business under the police power in pro-

tecting the general welfare, health, safety or morals of the public, then it might prohibit that industry by an excessive tax. Conversely, where a business is legitimate, useful and harmless, the right to engage therein is a property and a liberty and part of a man's "right to live and enjoy his life," for the protection of which the due process clause of the 14th amendment was designed.

Both the *McCray* case and the *Magnano* case, dealing as they do with a butter substitute and the right to foist that substitute on the public as butter, deal with an industry that can be prohibited under the police power. Indeed, this Court, in the *McCray* case, said at page 63:

> "This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this Court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the 14th amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction."

So, too, in the portion of the *Magnano* opinion which appellees quoted at page 41 of their brief, it is stated:

> "That clause (the due process clause of the 5th amendment) is applicable to a taxing statute such as the one here assailed only if the Act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." (Parentheses Ours.)

Thus it can be readily seen that where, as here, a legitimate, useful, harmless, and, indeed, necessary occupation is confiscated, the reasoning behind the *McCray* case and the *Magnano* case is not applicable. So, too, the *Sanchez* case, dealing with a tax on marihuana, is a classic example of a situation where a reprehensible and harmful business, which should be destroyed and which may be destroyed under the police power, can, in fact, be destroyed by taxation validly and constitutionally. None of these cases demonstrate to the slightest degree that the trucking industry, which is vital to our economy, may be thus destroyed by excessive taxation. Appellees have nowhere contended that the trucking industry could or should be destroyed in the interests of public welfare, safety, health or morals. In the absence in this record of evidence that the trucking industry is in any manner harmful to the public, the cases cited by appellees serve only to strengthen the contentions which we made in the appellants' brief. The cases which we cite show beyond doubt that a useful and legitimate business may not be destroyed by excessive taxation. The cases cited by appellees simply reiterate this point in the converse, to wit: a harmful and deceitful business which can be prohibited under the police power may be prohibited by excessive taxation.

Therefore, we submit that the uncontroverted evidence of confiscation and the uncontroverted law as set forth under Point II of appellants' brief is controlling in the case at bar, and that the 1951 amendment to the Illinois Motor Vehicle Law in imposing taxes so excessive as to confiscate all or a substantial segment of the trucking industry in Illinois violates the 14th Amendment to the Constitution of the United States and is unconstitutional.

IV.

The 1951 Amendment contains numerous arbitrary, inconsistent, vague and uncertain classifications in violation of Section 1, Amendment XIV of the Constitution of the United States.

In Point V of their brief, pages 44-52, appellees attempt to explain away the terms and classifications in the 1951 Act which we contend are so arbitrary, inconsistent, vague and uncertain as to violate the Equal Protection Clause of the Federal Constitution.

In this attempt, appellees rely largely on the opinion of the Illinois Supreme Court in the case of *Bode et al* v. *Barrett et al.*, 412 Ill. 204. It hardly need be said that it is that decision and the decision of the Illinois Court in the instant case which this Court is asked to reverse because of error in this case and in *Bode et al.* v. *Barrett et al.*, Docket 187. Certainly the United States Supreme Court is the final authority in interpreting the provisions of the United States Constitution including the Equal Protection Clause, and no state court of last resort can foreclose this Court's passing upon alleged violations of the Federal Constitution.

We do not quarrel with the principle that the decision of the highest court of a state is controlling as to the meaning and effect of its state constitution (*Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 613) or as to the construction to be placed on a statute of that state (*Hicklin* v. *Coney*, 290 U.S. 169, 172), but there is no basis for the position taken by appellees that this court may not examine a statute for indefiniteness or uncertainty (*Hicklin* v. *Coney*, 290 U.S. 169, 172).

In Paragraph 6, Page 50 of appellees' brief, they contend that the terms "gross weight" and "maximum load"

are not uncertain in view of the fact that the Illinois Supreme Court has held that such terms are definite and do not violate the Equal Protection Clause. Similarly in Paragraph 8, Page 51 of their brief, appellees make the brief assertion that the finding of the Supreme Court of Illinois that the phrase "a close radius thereof" is not indefinite and uncertain is a final and controlling finding which this court may not review. In the case of *Hicklin* v. *Coney*, 290 U.S. 169, 172, cited by appellees, this Court reviewed the statute in question on the matter of uncertainty and indefiniteness and found in favor of its validity.

Appellees further make the novel contention that because there was no testimony by appellants to the effect that they are directly affected or injured by the alleged defects in the Act that therefore this court is not permitted to consider the validity of such provisions. It would not have been competent testimony for these taxpayers to have testified that they were confused by or misunderstood the assailed provisions of the Act, or that they were suffering injury from the same. That appellants are affected by the challenged provisions of the Act claimed to be vague and uncertain does not require proof by their testimony. This Court is presented with propositions of law to be passed upon on the basis of the law and the facts in evidence. If these terms and classifications are so arbitrary, indefinite and uncertain that they violate the Equal Protection Clause, then the provisions must be struck down.

Likewise, when appellees state that there was no testimony in the record that any plaintiff in this case desired to operate a four-wheeled vehicle weighing in excess of thirty thousand (30,000) pounds, they are suggesting that the trial court might properly have heard testimony as to the desires and intentions of the plaintiffs which, needless to say, would not be competent and to which counsel for the State would most vigorously have objected.

In Paragraph 1, Page 46 of their brief, appellees strain to harmonize sub-sections (h) and (i) of Section 9 of the Act set out below:

> "(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twenty-four thousand (24,000) pounds, including the weight of the vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00.
>
> "(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00."

Appellees contend that sub-section (h) "comprises four-wheeled vehicles and vehicles having more than four wheels in the gross weight range from 20,000 to 24,000 pounds." That this construction is plainly incorrect is shown by observing that sub-section (i) uses the statutory language "four or more wheeled vehicles having a gross weight . . . " If the legislative draftsman had meant sub-section (h) to comprise "four or more wheeled vehicles having a gross weight of more than 20,000 pounds and not more than 24,000 pounds," as contended for by appellees, he would have so stated, as he did in sub-section (i)! The fact that sub-section (h) does not contain such language is evidence enough that the construction urged by appellees is incorrect.

In Paragraph 2 on Page 47 of appellees' brief they attempt to harmonize subsections (i-3) and (i-4) of Section 9 and state that vehicles having ten or more wheels are to

be taxed under sub-section (i-4) and not under sub-section (i-3) of Section 9. These sub-sections read as follows:

> "(i-3) Eight or more wheeled vehicles having a gross weight of over fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $889.00 until January 1, 1954, and thereafter $1245.00.
>
> "(i-4) Ten or more wheeled vehicles having a gross weight of more than fifty thousand (50,000) pounds, but not exceeding seventy-two thousand (72,000) pounds, including the weight of the vehicle and maximum load, $1134.00 until January 1, 1954, and thereafter $1588.00."

It would appear that vehicles having ten or more wheels come within both sub-sections. We point out to the court that by appellee's strained construction of sub-section (i-3) "8 or more" means "'8 or 9 but not 10 wheels!" Yet, elsewhere in Section 9 the words "or more" are given their commonly accepted meaning—apparently even by appellees.

In Paragraph 3, Page 47 of their brief, appellees discuss the question of discrimination against trucks in favor of a certain class of busses. They entirely miss the point urged by appellants in our brief. We do not complain of the separate classification of passenger-carrying vehicles on the one hand and freight-carrying vehicles on the other. What we do complain of is a special and lower rate of tax for busses operating "entirely within the territorial limits of a single municipality or a single municipality and municipalities contiguous thereto or a close radius thereof and equipped with hydraulic shock absorbers and whose rates are subject to regulation of the Illinois Commerce Commission." Appellees entirely beg the question when they state that the legislature is free to make a separate classification of passenger-carrying vehicles which are charged a lower tax rate than trucks and other busses.

Appellees on Page 49 of their brief confidently construe sub-section (i) of Section 9, quoted above, as including six or more wheeled vehicles weighing from 24,000 to 30,000 pounds. We submit that this confidence is misplaced in view of their construction of sub-section (i-3) where they construe "8 or more" wheels to mean "8 or 9 but not 10" wheels. By the same construction, the words "four or more" in sub-section (i) would have to mean "4 or 5 but not 6 wheels"! Appellees obviously attribute meanings to words and phrases in the statute to suit their own purpose, regardless of their commonly accepted meaning and with startling inconsistency.

In paragraph 5 on Page 49 of their brief, appellees again beg the question when they say that there is no discrimination in the Act in favor of owners of a tractor alone because such tractors "*must* be registered." We only pose the question "Why?", for nothing in the Act would require the owner of such a vehicle to pay a tax except in combination with a semi-trailer.

In support of their contention in Paragraph 7 on Page 51 of their brief that the phrase "like exemption and privileges" is not vague, uncertain and incapable of clear understanding, appellees conclude—"All that is required is the measurement of the motor vehicle tax provisions of another state's laws against the provisions of the Illinois law." Appellants do not suggest, however, how this measurement is to be made, and we submit that the Secretary of State is given no clear standard by which to make the comparison.

When appellees attempt to find approval for the phrase "agricultural pursuits" and cite language of the Illinois Supreme Court in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, 234, they do not even apply language pertaining to the question of the vagueness and uncertainty of that phrase, for the Illinois Court was there considering the agricultural

exemption contained in Section 9 insofar as it constitutes a separate exempt classification for certain vehicles. The vagueness and uncertainty of this term raises a very real and practical issue for these and other taxpayers. For example, Marion Field, who engages in the business of carrying livestock and feed (R. 80), might claim exemption under the Act as one engaged in "agricultural pursuits."

We submit that appellees in their brief have illustrated most forcibly the confusion in the 1951 Amendment of which we complain. The terms "close radius thereof," "like exemption and privileges," "agricultural pursuits," "maximum load" and "gross weight," must mystify and confuse the Illinois truckers, when they lead to the inconsistent, strained and uncertain meanings which appellees ascribe to them. Furthermore, appellees are unable to satisfactorily explain away the obvious overlapping of provisions, the omission of certain vehicles from the Act and the arbitrary creation of a special class of busses.

We submit, therefore, that because of these defects the 1951 Act is repugnant to the Equal Protection Clause of the Constitution of the United States and invalid.

Respectfully submitted,

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